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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

BRENDA PREMO, Director of the Department of Rehabilitation, State of California,
Petitioner,

v.

JEANA MARTIN; THE UNITED STATES DEPARTMENT OF EDUCATION; RICHARD W. RILEY, SECRETARY OF THE UNITED STATE'S DEPARTMENT OF EDUCATION,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE OF THE STATES OF NEVADA, ALABAMA, ARIZONA, COLORADO, FLORIDA, GEORGIA, LOUISIANA, MARYLAND, MICHIGAN, OKLAHOMA, AND VERMONT SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

1. Does the Randolph Sheppard Act explicitly authorize an arbitration panel to order a State to pay a blind vendor compensatory damages and attorneys fees?

2. Does a State waive its Eleventh Amendment immunity by applying to be designated a State licensing agency under the Randolph Sheppard Act?

INTEREST OF THE AMICI CURIAE

Each of the Amici Curiae States voluntarily participates in the federal-state cooperative program created by the Randolph Sheppard Act, 20 U.S.C. §§ 107-107f (the "Act"). The purpose of the Act is to assist blind persons in obtaining gainful employment. If the decision of the Ninth Circuit below is left standing, amici must review their participation in the program and possibly withdraw from it. Being subject to large compensatory damage actions in federal court was not part of the bargain Amici agreed to when they joined this Spending Clause program.

The Act gives blind persons licensed by State licensing agencies priority to operate vending facilities on federal property. Disagreements between States and blind vendors are decided through an arbitration panel. The court of appeals held that an arbitration panel can order a State to pay compensatory damages and the blind vendor can have that decision enforced in federal court.

The Amici States have agencies which are designated by the U.S. Department of Education as State licensing agencies under the Act. This authorizes those States to license blind vendors and place them at vending facilities on federal properties. The authorization is intended to increase employment opportunities for people who are blind and visually impaired. It is not intended to create large compensatory damage liabilities against States.

Moreover, Congress has passed numerous other laws under its Spending Clause power creating federal-state cooperative programs. States will hesitate to participate in those programs -- which benefit millions of people -- if federal courts continue to subject States to liability under them where there is no express statutory authorization. The decision below disregards established rules of statutory construction to ensure that when the federal government imposes obligations on the States it does so with the utmost clarity.

REASONS FOR GRANTING THE PETITION

I. A COMPENSATORY DAMAGE AWARD AGAINST A STATE IN FEDERAL COURT UNDER THE RANDOLPH SHEPPARD ACT WHICH CREATES A FEDERAL-STATE COOPERATIVE PROGRAM UNDER THE SPENDING CLAUSE OF THE CONSTITUTION IS AN IMPORTANT MATTER AS TO WHICH THE CIRCUITS ARE IN CONFLICT.

A. The Decision Below Erroneously Subjects The States To Large Compensatory Damage Awards Under A Spending Clause Program That Does Not Expressly Impose Such Liability On The States.

"(T)he possibility of large monetary liability for unintended [violations of federal law] might well dissuade potential nondiscriminating recipients from participating in federal programs, thereby hindering the objectives of the funding statutes." *Guardians Ass'n. v. Civ. Serv. Com'n of City of N.Y.*, 463 U.S. 582, 602 (1983) (White, J. joined by Rehnquist, J.). This Court has developed specific rules of statutory construction to encourage States to participate in federal-state cooperative programs authorized by the Spending Clause of the Constitution. The court of appeals below misinterpreted these rules thereby erroneously subjecting States to large damage claims under the Act.

If Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. *Pennhurst State Sch. & Hospital v. Halderman,* 451 U.S. 1 (1981). "Congress will not implicitly attempt to impose massive financial obligations on the States." *Pennhurst*, 451 U.S. at 17. Make whole remedies are not ordinarily available in private actions seeking relief for violations of federal statutes

passed pursuant to the Spending Clause placing conditions on the grant of federal funds. *Guardians Ass'n.*, 463 U.S. at 597.

The language of the Randolph Sheppard Act does not explicitly authorize compensatory damages and attorneys fees against a State. It creates a federal-state cooperative program pursuant to the Spending Clause. Under the Act blind people licensed by States are given priority to operate vending facilities on federal properties. A state applies to be designated as a State licensing agency by the United States Department of Education. 34 C.F.R. § 395.2. If designated, the State licensing agency submits a permit including the terms and conditions of operating a facility to a federal property manager. 34 C.F.R. § 395.16. If the federal department approves the permit, it is issued to the State agency. Among other requirements, the State agency places a licensed blind vendor at the vending stand on the federal property. 34 C.F.R. §§ 395.34, 395.35, and 395.7. The State collects set-aside funds from the blind vendors operating within the State to administer the program. 34 C.F.R. §§ 395.9 and 395.1(s).

Disputes between a State licensing agency and a blind vendor are subject to arbitration. Title 20 U.S.C. § 107d-1(a) states, "...the decision of such panel shall be final and binding on the parties except as otherwise provided in this chapter." Title 20 U.S.C. § 107d-2(a) states, "Such panel shall, in accordance with the provisions of subchapter II, of chapter 5 of Title 5, give notice, conduct a hearing, and render its decision which shall be subject to appeal and review as a final agency action for purposes of chapter 7 of such Title 5." These are the only sections of the Act which describe the remedies which may be imposed against a State. In this case, the Ninth Circuit upheld an arbitration panel's order that California pay a blind vendor almost $380,000 in compensatory damages, about $5700 per month in future earnings, and over $70,000 in attorneys fees.

The words "the decision ... shall be final and binding" and "final agency action" do not unambiguously or explicitly authorize an arbitration panel to require a State to pay compensatory damages or attorneys fees to a blind vendor. These words do not, in any way, mention damages. Accordingly, an arbitration panel under the Act has no authority to require a State to pay compensatory damages to a dissatisfied blind vendor.

This conclusion is supported by the Act's reference to the Administrative Procedures Act ("APA") in 20 U.S.C. § 107d-2(a). The APA gives a right of review to United States court to a party seeking relief, "other than money damages." *Lane v. Pena,* ___ U.S. ___, 116 S.Ct. 2092, 2098 (1996). These words of the APA demonstrate that no money damages were explicitly authorized by the Act.

In this one case alone, California's participation in the Act resulted in a $450,000 judgment against it. Other plaintiffs in States across the nation are sure to follow Respondent Martin's lead. The Ninth Circuit's reading of the Act has thus opened the door to significant damages actions against the States under a statute that says nothing about the imposition of damages. The Ninth Circuit's decision changes the "contract" the States entered into when they agreed to participate in the Act and threatens to re-write the contracts States made when entering into various other Spending Clause programs. *See, e.g.*, Block Grants for Temporary Assistance for Needy Families of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub.L. 104-193, Title I, §§ 101-116, 110 Stat. 2110-2185, the Developmentally Disabled Assistance and Bill of Rights Act, as amended, 42 U.S.C. § 6000-6083, the Individuals with Disabilities Education Act, 42 U.S.C. §§ 1400-1486, and the grant to assist in administering state unemployment compensation law, 42 U.S.C. §§ 501-504.

In conclusion, the decision of the Ninth Circuit Court of Appeals violates the specific rules of construction applicable to statutes which create federal-state cooperative programs under the Spending Clause. It will discourage States from participating in these programs because a State will not know all of its obligations before taking part in the program.

B. The Decision Of The Ninth Circuit Court of Appeals Conflicts With The Decisions of Other Courts Of Appeals.

The decision of the Court of Appeals for the Ninth Circuit requiring a State to pay compensatory damages and attorneys fees is consistent with two other circuits and conflicts with others. The Courts of Appeals for the Third and Sixth Circuits held that the Act authorizes a panel to award compensatory damages against a State. *Delaware Dept. of Health v. United States Dept. of Education,* 772 F.2d 1123 (3d Cir. 1985) [arbitration panel may award attorneys fees, also]; *Tennessee Dept. of Human Services v. U.S. Dept. of Education,* 979 F.2d 1162 (6th Cir. 1992). In contrast, two other courts of appeals held that no compensatory damages were authorized under the Act. *McNabb v. U.S. Dept. of Education,* 862 F.2d 681 (8th Cir. 1988) *cert. denied, sub nom. McNabb v. Georgia,* 493 U.S. 811 (1989); *Georgia Department of Human Resources v. Nash,* 915 F.2d 1482 (11th Cir. 1990).[1]

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[1] The Act creates an arbitration procedure for resolving disputes between States and the federal government, also. The words of the Act creating the remedy in an arbitration proceeding between a blind vendor and a State are the same as the words creating the remedy between a State and the federal government. Compare 20 U.S.C. § 107d-1(a) with § 107d-1(b). Also, 20 U.S.C. § 107d-2(a) governs both procedures. The courts of appeals are split on whether a remedy is available in disputes between a State and the federal government. Two courts of appeals and one district court have concluded no remedy is available. *Maryland State Dept. of Educ. v. U.S. Dept. of Veterans Affairs,* 98 F.3d 165 (4th Cir. 1996) (continued...)

If the Court construes the Act to not authorize an award of compensatory damages and attorneys fees against a State, then the constitutional issue discussed below need not be decided. See *U.S. v. Clark*, 445 U.S. 23 (1980). If the court decides the Act does create such a remedy, then the Eleventh Amendment immunity issue, below, is presented.

II. WHETHER STATES WAIVED THEIR ELEVENTH AMENDMENT IMMUNITY BY BEING DESIGNATED AS STATE LICENSING AGENCIES IS AN IMPORTANT MATTER AS TO WHICH THE CIRCUITS ARE IN CONFLICT.

A. The Act Does Not Manifest A Clear Intent To Condition Participation In The Program On A State's Waiver Of Eleventh Amendment Immunity.

The Eleventh Amendment protects a State from being sued in federal court. *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy*, 506 U.S. 139 (1993). "The very object and purpose of the 11th Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." (cite omitted) 506 U.S. at 146.

In light of these considerations, Spending Clause statutes must manifest a clear intent to condition participation

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[1](...continued)
cert. den. Docket No. 96-1550 and 1551, October 6, 1997. *Georgia Dept. of Human Resources v. Nash*, 915 F.2d 1482 (11th Cir. 1990); *U.S. v. Mississippi Vocational Rehabilitation for the Blind*, 794 F.Supp. 1344, *amended*, 812 F.Supp. 85 (S.D.Ms. 1992). In contrast, the District of Columbia circuit ruled that an arbitration panel may order a remedy when it decides a federal agency violated the Act. *Randolph-Sheppard Vendors of America v. Weinberger*, 795 F.2d 90 (D.C. Cir. 1986). The eighth circuit court of appeals affirmed an order requiring a federal agency to follow the permit procedure under the Act. *Minnesota Dept. of Economic Security v. Riley*, 18 F. 3d 606 (8th Cir. 1994).

in the program on a State's waiver of Eleventh Amendment immunity. *Atascadero State Hospital v. Scanlon,* 473 U.S. 234, 246-247, n. 5 (1985). Waiver of Eleventh Amendment immunity is found only where express language or overwhelming implications from the text leave no room for any other reasonable construction. *Edelman v. Jordan*, 415 U.S. 651 (1974). For example, a general statement to obey federal law does not waive a State's Eleventh Amendment immunity. *Florida Dept. of Hlth. v. Florida Nursing Home,* 450 U.S. 933, (1981).

The law most similar to the Randolph Sheppard Act is Section 504 of the Rehabilitation Act of 1973 (codified at 29 U.S.C. §§ 794 and 794a). At the time *Atascadero* was before this Court the Rehabilitation Act included numerous references to the States. Those references to the States did not manifest a clear intent to condition participation in the funded program on a State's consent to waive Eleventh Amendment immunity. *Atascadero State Hospital v. Scanlon,* 473 U.S. 234 (1985).

In this case, 20 U.S.C. § 107d-1(a) says the State licensing agency shall provide a full evidentiary hearing upon the request of a blind vendor. Title 20 U.S.C. § 107d-2(b)(1) says the State licensing agency shall appoint one member of the arbitration panel and the chairman of the panel shall not be an employee of the State licensing agency. Those are the only references to the State in the two sections of the Act governing arbitration procedures. Those references do not contain express language waiving sovereign immunity. See *Lane v. Pena,* ___ U.S. ___, 116 S.Ct. 2092 (1996). Further, they do not create an "overwhelming implication" that a State must waive its Eleventh immunity to be designated as a State licensing agency. *Atascadero.*

In addition, this conclusion is supported by the Administrative Procedures Act. The Act specifically incorporates the Administrative Procedures Act ("APA") which states in 20 U.S.C. § 107d-2(a) that "Such panel shall, in

accordance with the provisions of subchapter II, of chapter 5 of Title 5, give notice, conduct a hearing, and render its decision which shall be subject to appeal and review as a final agency action for purposes of chapter 7 of such Title 5."

Title 5 U.S.C. § 702 authorizes a person aggrieved by an agency action to bring "(a)n action in a court of the United States seeking relief *other than money damages*" (emphasis added). The Act and the APA specifically do not waive a State's immunity to actions for money damages. See *Lane v. Pena*, ___ U.S. ___, 116 S.Ct. 2092, 2098 (1996) (no waiver of federal government's sovereign immunity against monetary damages by 5 U.S.C. § 702).

B. The Courts Of Appeals Conflict On Whether A State Waives Its Eleventh Amendment Immunity By Applying To Be a State Licensing Agency.

The Ninth Circuit in this case and the Third Circuit concluded that States waived their Eleventh Amendment immunity by applying to be State licensing agencies under the Act. *Premo v. Martin*, 119 F.3d 764 (9th Cir. 1997); *Delaware Dept. of Health v. United States Dept. of Education*, 772 F.2d 1123 (3d Cir. 1985). These decisions conflict with the Court of Appeals for the Sixth Circuit which held that a State did not waive its sovereign immunity. *Tennessee Dept. of Human Services v. U.S. Dept. of Education*, 979 F.2d 1162 (6th Cir. 1992). The Court of Appeals for the Eighth Circuit could not reach a consensus on the question. *McNabb v. U.S. Depart of Education*, 862 F.2d 681 (8th Cir. 1988).

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: November 5, 1997.

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